

CC:EL:D:3131-95
Br3:STate

Assistant Commissioner (Procurement) M:P:C:T
Attn: J.T. Smith (Tax Systems Administration Branch)

Chief, Branch 3 (Disclosure Litigation) CC:EL:D

Disclosure to Current Contractor of Information Provided by
Former Contractor

This is in response to your memorandum of July 12, 1995, addressed to the Assistant Chief Counsel (General Legal Services) (GLS), seeking advice as to how to treat certain information provided to you by a former contractor.

ISSUE

Whether you may disclose to the current contractor information provided by a former contractor after the current contractor has been awarded the contract, which information the former contractor has indicated is "confidential and propriety" and which relates information pertaining to the current contractor's ability to perform.

CONCLUSION

Disclosure of this information in the course of procurement activity would not violate the disclosure laws. We defer to GLS on the question of whether such disclosure is permitted under the laws, regulations, and principles applicable to the contracting situation.

We note that it may be possible for you to ascertain the accuracy of the information without indicating to ECI that anyone outside the IRS is involved. Proceeding in this manner would avoid any question of whether disclosure to ECI of the information provided by GAC is permitted.

FACTS

Our knowledge of the facts is from your memorandum dated July 12, 1995. The contract for maintenance of the Distributed Input System was held by General Analytics Corporation (GAC) until its expiration on March 31, 1995. The subsequent maintenance contract was awarded to Eastern Computers, Incorporated (ECI). As of the date of your memorandum, ECI had met all of the contractual requirements and was performing

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satisfactorily.

Since the award of the maintenance contract to ECI, GAC has sent faxes and letters derogatory of ECI to your office and to Service Center personnel. The documentation provided by GAC has raised questions as to ECI's ability to perform the contract.¹ Internal Audit has indicated to you that they plan to perform an on-site audit of ECI and two subcontractors.

GAC has indicated that all of the information they have provided is confidential and proprietary. You have asked whether you may discuss the information with ECI.

ANALYSIS

We do not perceive a disclosure issue in this matter. Section 6103 of the Internal Revenue Code does not apply to the material supplied by GAC because this material is not "return information".² Neither the Freedom of Information Act, 5 U.S.C. § 552, nor the Privacy Act, 5 U.S.C. § 552a, applies to your inquiry.³

Whether disclosure of this information to ECI would violate the terms of the contract, the FAR, pertinent Treasury regulations, or general contracting principles are issues more properly addressed by GLS. We defer to GLS on these issues.

¹Based upon the sample correspondence attached to your memorandum, it seems there may be concern relating to the technical knowledge of ECI's staff and relating to whether ECI has met various contract requirements.

²I.R.C. § 6103 provides for the confidentiality of information received by the IRS with respect to the determination of the existence of liability under Title 26. This information relating to ECI's ability to perform a contract is not information received with respect to liability under Title 26.

³The Freedom of Information Act (FOIA) authorizes the release of documents to the public upon written request; we are unaware of any written request in this case. It is clear that your office wishes to disclose the information contained in the communications from GAC to ECI on your own. The FOIA presents no bar to this type of release of information. The Privacy Act applies only to records maintained about an individual which are retrieved by that individual's name or other identifier. 5 U.S.C. § 552a(a)(4), (5). The Privacy Act is inapposite to a release of records about a corporation or other business entity. 5 U.S.C. § 552a(a)(2); OMB Guidelines, 40 Fed. Reg. 28948, 28951 (July 9, 1975); St. Michael's Convalescent Hospital v. California, 643 F.2d 1369, 1373 (9th Cir. 1981). If a written request for documents is received, it should be forwarded to the Office of Disclosure for processing.

One possible basis for withholding from ECI the information received from GAC is the informant's privilege. This is the government's privilege to withhold the identity of a person who furnishes the government with information relating to violations of the law. Roviaro v. U.S., 353 U.S. 53, 59 (1957). The privilege also permits the government to withhold those portions of the provided information which tend to identify the informant. This privilege is the government's to assert, not the informant's.

Obviously, the government may choose not to assert the privilege if it is in the government's best interest to disclose the information for contract administration purposes. The purpose of this privilege is to maintain the flow of information to the government. Id. at 59. In the instant case, a decision-maker could determine that GAC is providing the information for its own self-interest, and therefore, the information flow would not cease if we identify the informant or reveal the correspondence. Authority to assert or waive the informant's privilege on the government's behalf in a contracting situation would lie with the Office of the Assistant Commissioner (Procurement). We defer to your office and to GLS to determine which individuals have this authority.

Since GAC asserts that the information they have provided is privileged and confidential, they may object strenuously to disclosure of this information, or GAC's part in providing it, to ECI. From a disclosure standpoint, avoiding a confrontation with GAC over this issue is fairly easy. The Contracting Officer's Technical Representative could mention perceived or potential problems, in the context of contract administration, without indicating that anyone outside the IRS has called these issues to your attention. Similarly, it would be possible to request confirmation of the continued employment of any employees who are key to the performance of the contract. In either case, no disclosure would occur so long as it is not revealed that information provided by a third party is the motivation for these inquiries.

If we may be of further assistance in this matter, please contact Sarah Tate at 622-4590.

Michael B. Frosch

cc: D.M. Suica, Chief, Public Contract Law Branch